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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal From The Supreme Court of Mississippi

REPLY MEMORANDUM

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REPLY MEMORANDUM

Appellee's Motion to Dismiss ("Motion"), offers a series of speculations regarding potential bases for the absence of any reference to appellant's federal constitutional challenges in the opinion of the court below or its order denying appellant's Petition for Rehearing and Motion to Correct Judgment. However, the court below did not rely on any of the arguments advanced for the first time here by appellant. Even had the court done so expressly, appellee could not escape the square holding of this Court in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), that the Supreme Court of Mississippi "regularly grants petitions for rehearing without mentioning any restrictions on its authority to consider issues raised for the first time in the petitions." *Id.*, at 263 (footnote omitted).

Appellee does not even attempt to bring to this Court's attention any evidence that the practice, determined by this Court to be regularly followed as of 1982, is no longer the practice of the court below. Appellee could not do so because the court below has, subsequently to this Court's decision in *Hathorn*, corroborated this Court's determination in *Hathorn* by continuing to entertain and decide questions raised for the first time at the rehearing stage. *See Pitts* v. *Mississippi Bar Association*, 462 So.2d 340, 342 (Miss. 1985) (en banc).

Even appellee's attempt to restrict *Hathorn* to cases in which the court below "renders an unexpected interpretation of state law" is of no avail because appellee does not contest appellant's argument that the punitive damage award in this case could have been affirmed by the court below only by the application of new substantive rules regarding the imposition of such awards. Thus, under his own analysis of *Hathorn*, appellee necessarily concedes this Court's jurisdiction.

I

JURISDICTION

In *Hathorn* v. *Lovorn*, this Court considered—after full briefing of the point—and rejected the argument that a question raised for the first time by a party in a petition for rehearing in the Supreme Court of Mississippi could be viewed as having been improperly presented for purposes of this Court's jurisdiction. This square holding in *Hathorn* was based upon this Court's determination, not challenged by appellee here, that the court below regularly entertains new questions in petitions for rehearing. This determination compelled the Court's holding in *Hathorn* that the federal question presented for the first time on rehearing in the Supreme Court of Mississippi in that case was properly presented for purposes of this Court's jurisdiction, because under the well-established rule laid down in cases such as *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964), no state procedural rule may be successfully invoked to deprive this Court of jurisdiction over a substantial federal question unless that rule is "strictly or regularly" followed by the state court. The practice of the court below is regularly to *permit* the raising of federal and state law issues at the rehearing stage. Since this Court's decision in *Hathorn*, the Supreme Court of Mississippi has continued this practice.

Appellee purports to distinguish *Hathorn* on two bases. First, appellee argues, Motion, at 9, that *Hathorn* controls only cases "in which the Mississippi Supreme Court renders an unexpected interpretation of state law." Appellee's argument, however, is based on this Court's discussion of a single case in the court below, *Quinn* v. *Branning*, 404 So.2d 1018 (Miss. 1981), when in fact this Court relied on at least a dozen other decisions of the court below in addition to *Quinn* in determining what the actual practice of the court below *is*. Appellee does not suggest that the other cases relied on by this Court in *Hathorn* involved

situations in which the court below had rendered "an unexpected interpretation of state law." Any such argument would fail. *See, e.g., Powers* v. *Malley*, 302 So.2d 262, 264-65 (Miss. 1974) (court applies existing law to question of plaintiff's legal entitlement to an instruction).

Even if *Hathorn* could be limited as suggested by appellee, it would still squarely control this case. As argued by appellant, Juris. Stat., at 18-19 & n.7, the punitive damage award in this case could have been affirmed *only* by a substantial modification to the substantive rules governing bad faith actions in Mississippi and the establishment of new rules to govern such actions. Nowhere in his Motion in this Court does appellee contest this point. Thus, under appellee's own reading of *Hathorn*, the appellant cannot be expected to have anticipated these changes in governing Mississippi law and this Court has jurisdiction over this case. Even in the absence of *Hathorn*, the doctrine of surprise established in cases such as *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930), and *Saunders* v. *Shaw*, 244 U.S. 317 (1917), would lead to the same result.

Second, appellee argues, Motion, at 9 n.2, that the cases relied on by this Court in *Hathorn* involved "factual" rather than "legal" questions which were raised on rehearing. However, *Powers* v. *Malley*, *supra*, and other cases relied on in *Hathorn* such as *McCrory* v. *State*, 342 So.2d 897 (Miss. 1977) (grand jury held legally entitled to compel person to provide handwriting samples under Mississippi constitution), are contrary to appellee's assertion.[1]

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[1] Appellee's point is as obscure as its characterization of these cases is inexplicable. Certainly any state court rule permitting new factual issues to be raised for the first time at the rehearing stage but forbidding the raising of substantial federal constitutional questions on the same basis would be viewed as an invidious discrimination against litigants who either desire or must assert their federal rights in the state courts of Mississippi.

While appellee's inability to distinguish *Hathorn* v. *Lovorn* is dispositive of the claim that this Court has no jurisdiction over this case, appellant would nonetheless prevail on the question of jurisdiction even if there were no established practice in the court below of regularly entertaining and deciding issues raised for the first time at the rehearing stage in that court.

A. Presentation of the Federal Constitutional Challenge to *Miss. Code Ann.* § 11-3-23 (Supp. 1982).

Appellee acknowledges, as he must, that for over a century the court below has regularly entertained questions regarding the interpretation and constitutionality of § 11-3-23 and its predecessor statutes in post-affirmance motions. Appellee's response is to attempt to draw a distinction between cases in which the penalty is imposed, in which a post-affirmance challenge is permitted, and cases in which the penalty is not, in which a post-affirmance objection is permissible. This argument finds no support in logic or cases in the court below[2] and cannot be rec-

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[2] Appellee points out, Motion, at 7, that the court below has not issued any interpretation of § 11-3-23 at the rehearing stage other than in connection with a motion filed by an appellee who was seeking to recover an appeal penalty from an appellant. Appellee apparently draws the inference from this fact that the court below allows appellees to raise questions regarding § 11-3-23 at the rehearing stage, but does not allow appellants to do so. If that is a rule of the court below, it has never been articulated by that court in any decision, and no such rule is to be found in any statute of Mississippi or rule of the Supreme Court of Mississippi. *See Hathorn* v. *Lovorn*, 457 U.S., at 263 n.13. Nor does appellee point to *any* case in the court below in which that court has expressly refused to consider a question raised by an appellant regarding § 11-3-23. Indeed, under appellee's analysis the court below follows an unarticulated rule under which an appellant can raise a federal constitutional challenge to § 11-3-23 at the rehearing stage, but can only do so *if* the court below, for whatever reason, fails to impose the penalty on the appellant *and* the appellee seeks imposition of the penalty, the situation present in *Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978). Appellee understandably fails to suggest what rational state pur-

onciled with Rule 19 of the Rules of the Supreme Court of Mississippi. That rule admits of no such distinction, stating plainly that "[a]ll motions . . . for the *awarding or disallowance* of fifteen percent (15%) damages on appeal . . . shall be filed within thirty (30) days from the date of the handing down of the opinion." (emphasis added). Furthermore, appellant could not reasonably have anticipated that the court below would refashion the Mississippi substantive law of bad faith in order to affirm this punitive damage award. Appellant was not required, any more than was the petitioner in *Hathorn* v. *Lovorn*, to raise its challenge to the relevant state statute on direct appeal.[3]

B. Presentation of the Federal Constitutional Challenge to the Punitive Damage Award

Appellee's discussion of appellant's presentation of its challenge to the punitive damage award neither mentions *Hathorn* v. *Lovorn* nor argues that appellant's presentation of this federal question at the rehearing stage was in any way deficient. Indeed, appellee's argument does not respond at all to the fact that at the rehearing stage, appellant expressly invoked the Due Process Clause of the Fourteenth Amendment in challenging the punitive damage award. If, as appellant maintains, *Hathorn* v. *Lovorn* is dispositive of appellant's right to raise this federal con-

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pose such a bizarre rule would serve, a failure which reflects the incredibility of appellee's conjecture.

[3] Thus, appellee's argument, Motion, at 9-10, that appellant should have known that the fifteen percent penalty would be assessed if the trial court's judgment were affirmed is correct but is beside the point. The question is not whether appellant knew that the appeal penalty would be imposed if the trial court's judgment were affirmed; rather, it is whether appellant could anticipate that a bare majority of five members of the court below would affirm the punitive damage award by changing previously applicable and controlling Mississippi law. Section 11-3-23 therefore came into play only because of that change in Mississippi law, and appellant raised its federal challenge at the first (and only) opportunity thereafter.

stitutional question, then the entirety of appellee's challenge to this court's jurisdiction over this question is irrelevant to the question of this Court's power to decide this question.

Appellee's arguments regarding appellant's challenge to the punitive damage award prior to the rehearing stage are both legally irrelevant and lack merit. Appellee relies on Rule 6 of the Rules of the Supreme Court of Mississippi to argue that appellant's assertion below that " '[t]he award of punitive damages violates Appellant's due process rights' " was not sufficiently "distinctly assigned" to permit argument of that question in the Supreme Court of Mississippi. Appellee relies on two cases in the court below, one which involved the total absence of any assignment of the point argued, *Harkins* v. *Paschall*, 348 So.2d 1019, 1024 (Miss. 1977), and one in which the court below, after invoking Rule 6, decided the very point which it said was not properly assigned, *Dorroh* v. *Cotten*, 259 So.2d 121, 123 (Miss. 1972). The third case relied on by appellee, *Overstreet* v. *Allstate Insurance Co.*, 474 So.2d 572 (Miss. 1985), also resulted in the resolution by the court below of an issue which had not been raised by the appellant until the filing of its rebuttal brief, even though the court below, as it had done in *Dorroh*, suggested that it could not reach that issue because of Rule 6. Thus, of the three cases in the court below cited by appellee to support this argument, one is distinguishable on its facts because it involved *no* presentation of the point to be argued (*Harkins*), and the other two (*Dorroh* and *Overstreet*) demonstrate that the practice of the court below is to invoke, then ignore, Rule 6. Whatever Rule 6 may mean, it could in no event serve as a bar to this Court's jurisdiction over a substantial federal question because it is not "strictly or regularly" followed.[4]

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[4] The decision in *Overstreet* also refutes the appellee's unsupported assertion, critical to his argument, that the "plain language" of Rule

Appellee next raises, Motion, at 13, an entirely separate argument that the assignment of error as quoted above could have been an invocation of Mississippi's due process clause, Miss. Const. Art. 3, § 14, rather than the Due Process Clause of the Fourteenth Amendment. Appellee invokes this Court's decision in *Webb* v. *Webb*, 451 U.S. 493 (1981), a case in which this Court, after reviewing the record and briefs of the parties filed in the Supreme Court of Georgia, concluded that the petitioner had never cited to or invoked *any* provision of the federal constitution in the Georgia courts. Because no federal constitutional right had ever been asserted "at any point in the state-court proceedings," *id.*, at 498, the *Webb* Court concluded that it was without jurisdiction over the case.

Appellee's confused reliance on *Webb* simply fails to reckon with the fact that appellant expressly invoked the Due Process Clause of the Fourteenth Amendment in its brief on direct appeal, J.S. App., at 135a, and at the rehearing stage, J.S. App., at 150a. This reliance by appellant on the Fourteenth Amendment, however inartful,[5] renders *Webb* inapposite.[6]

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6 does not permit a defect in an assignment of errors to be cured by a more specific argument in a brief, Motion, at 11. The clear implication from *Overstreet* is that had the appellant raised the point in its opening brief rather than waiting until its rebuttal brief, thereby denying the appellee a chance to respond, Rule 6 would not have been applicable at all.

[5] The main thrust of appellee's argument, as stated in his Motion, at 16 n.3, appears to be that appellant did not adequately develop its federal constitutional challenge to the punitive damage award in the courts below. However, as numerous cases in this Court make clear, this Court's "jurisdiction does not depend on citation to book and verse," *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). The specificity with which appellant raised its federal constitutional challenge to the punitive damage award is at least as substantial as in cases over which this Court has assumed jurisdiction, including, in addition to *Eddings*, *Taylor* v. *Kentucky*, 436 U.S. 478, 482 n.10 (1978) (Fourteenth Amendment not invoked until judgment was on appeal); *Webb's Fabulous Phar-*

Finally, appellee argues that appellant failed to raise its federal constitutional challenge to the punitive damage award in its motion for new trial. Motion, at 15. As discussed above with respect to the raising of this federal constitutional question on direct appeal, appellee's argument appears to be nothing more than a quibble over the "imprecise language" used in appellant's post-trial motion. Appellant's express reliance on the Due Process Clause of the Fourteenth Amendment on direct appeal clearly cured any arguable defect in its post-trial motion, *see* note 5 and cases cited, *supra*, insofar as this Court's rules regarding proper presentation are concerned. And, like many of the cases relied on by appellee in this Court to support other points, the cases cited by appellee actually reinforce and extend the determination of this Court in *Hathorn* v. *Lovorn* that the court below, if it even has any rules regarding presentation of questions to it on direct appeal, does not apply any rule consistently enough to displace this Court's jurisdiction.[7]

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macies, Inc. v. *Beckwith*, 449 U.S. 155, 159 n.5 (1980) (Court has jurisdiction based on "due process" arguments advanced in a memorandum which made reference several pages later to the state constitution "and its Federal counterpart"); and *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590 (1954) (invocation of federal Commerce Clause sufficient to raise question properly cognizable under the Due Process Clause of the Fourteenth Amendment).

[6] As is clear from *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S., at 159 n.5, if appellant had relied below on both Mississippi's due process clause and the Due Process Clause of the Fourteenth Amendment, that reliance would not have affected this Court's jurisdiction, which arises solely from appellant's invocation of the Due Process Clause of the Fourteenth Amendment. Thus, appellee's suggestion, Motion, at 11-13, that appellant's assignment of error could have been a reference to Mississippi's due process clause is irrelevant to this Court's jurisdiction over this case.

[7] In addition to the cases cited and discussed at p. 6, *supra*, appellee cites, Motion, at 14, three cases assertedly supporting the proposition that the court below "has consistently refused to consider on appeal defenses which were not alleged or argued at trial." None of those

Appellee understandably makes no reference to the fact that the trial court held that it had no power to reduce the punitive damage award, Juris. Stat., at 11. Nor does appellee in any way challenge appellant's assertion, Juris. Stat., at 11, that this express ruling of the trial court deprived appellant of "a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined by that court." *Central Union Telephone Co.* v. *Edwardsville*, 269 U.S. 190, 194-195 (1925).[8]

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cases suggests that a federal constitutional challenge to the size of a punitive damage award would be regarded as a "defense" as appellee uses that term. In addition, in one of those three cases, the court below expressly reached the merits of the issue it indicated could not be raised. *Memphis Bank & Trust Co.* v. *Pate*, 362 So.2d 1245, 1250, (Miss. 1978) ("appellant had perfected its security interest . . . ."). In the other two cases, the court below remanded the cases for new trial and invited the pertinent parties to raise the issues anew. *Cain* v. *Mid-South Pump Co.*, 458 So.2d 1048, 1051 (Miss. 1984); *Dobbs-Maynard Co.* v. *Jumper*, 388 So.2d 879, 883 (Miss. 1980). Indeed, in *Dobbs-Maynard* the court below directed the parties to one of its cases "bearing" on the issue.

Appellee, Motion, at 15, cites three cases purporting to stand for the proposition that an assignment of error not included in a motion for new trial "is deemed waived and will not be considered on appeal." In one of the cases cited by appellee, the court below stated that principle and then proceeded to rule on the question it said could not be raised. *Mercier* v. *Davis*, 234 So.2d 902, 904 (Miss. 1970). This pattern of the court below in reaching and deciding questions said to be beyond its power to decide because not raised at the trial level is repeated in yet another case relied on by appellee, Motion, at 15, for the proposition that these technical pleading rules are applicable to constitutional issues. In *Comfort* v. *Landrum*, 52 So.2d 658, 659 (Miss. 1951), the court below, after squarely holding that there "is no merit in appellant's contention that he was denied due process of law," went on to observe that "these constitutional issues were not raised in the trial court, so appellant is in no position to raise them for the first time on appeal."

[8] Appellee also argues, Motion, at 14, that appellant's federal constitutional challenge had to be pleaded as an affirmative defense in appellant's Answer to the complaint. None of the cases apparently cited

Under these circumstances, appellee's arguments, taken individually or collectively, do not undermine this Court's jurisdiction. There is simply no doubt that "the record as a whole shows [both] expressly [and] by clear intendment" that the federal questions presented in this appeal have been "adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

II

THE SUBSTANTIALITY OF THE FEDERAL QUESTIONS

Six Justices of this Court declared six weeks ago that the identical issues raised by appellant in this case are "important issues which, in an appropriate setting, must be resolved." Appellee fails to respond to this unequivocal statement in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601, other than to state that "none of the questions presented [by Bankers Life] presents a substantial federal question . . . ." Appellant submits that this Court determined in *Lavoie* that the questions now being raised by Bankers Life are substantial, and appellee has not even endeavored to suggest otherwise.

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by appellee for that proposition, or the state statute relied upon by appellee, even discuss whether Mississippi requires federal constitutional issues to be raised in a litigant's initial pleading in order to be preserved for appellate review. In any event, appellant's federal constitutional challenge regarding the excessiveness of the punitive damage award was not susceptible to being framed until the jury returned a verdict in the size it did.

June 2, 1986

Respectfully submitted,

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